

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****CRIMINAL APPEAL No. 730 of 1999****For Approval and Signature:****HONOURABLE MR.JUSTICE J.M.PANCHAL****AND****HONOURABLE MR.JUSTICE H.B.ANTANI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment?
  - 2 To be referred to the Reporter or not?
  - 3 Whether their Lordships wish to see the fair copy of the judgment?
  - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
  - 5 Whether it is to be circulated to the Civil Judge?
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**PRAVINBHAI @ VINOD KESHABHAI - Appellant**

**Versus**

**STATE OF GUJARAT - Opponent**

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**Appearance :**

THROUGH JAIL for the Appellant.

MR DEEPAK M SHAH for the Appellant.

MR ND GOHIL, ADDITIONAL PUBLIC PROSECUTOR for the Opponent.

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**CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL**

**and****HONOURABLE MR.JUSTICE H.B.ANTANI**

**Date : 26/09/2005**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)**

1. Instant appeal, filed under Section 374 (2) of the Code of Criminal Procedure, 1973, is directed against judgment dated August 29, 1997, rendered by the learned

Additional Sessions Judge, Ahmedabad City in Sessions Case No. 268 of 1996, by which the appellant is convicted under Section 22 of Narcotics Drugs and Psychotropic Substances Act, 1985 ("*the Act*", for short) and sentenced to RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default RI for 1 year.

2. The facts emerging from the record of the case are as under:

In or about July 1996, Mr. N. N. Pathan was discharging duties as Police Inspector, State Narcotic Cell, CID Crime, Gujarat. On July 13, 1996, he received an information from his informant that a person, known as Pravin *alias* Vinod Datania, wearing white full sleeved shirt and pant having red and black checks, was to pass on foot with a bag containing *charas* from *Chalte Pir Ni Darga, Dilli Chakla* between 13-45 Hours and 14-30 Hours. On receipt of the information, PI Mr. Pathan reduced the same into writing and made necessary entry in the Register maintained for this very purpose. He also forwarded his report to Mr. K. C. Modi, Deputy Superintendent of Police, who was his immediate official superior. He requisitioned services of two *panch-*

witnesses and ascertained whether they were willing to act as *panch-witnesses*. On *panch-witnesses* expressing their willingness to act as *panch-witnesses*, PI Mr. Pathan conveyed information received by him to them. Thereafter, the first part of the *panchnama* was drawn at the Police Station itself. The members of raiding party went in Government vehicles near Traffic Circle. Thereafter, they proceeded on foot towards *Chalte Pir Ni Darga* and maintained a watch. At about 14-00 Hours, a person, answering description given in the secret information, was spotted. Therefore, he was intercepted by Constable Parag. On interrogation, he disclosed his name to be Pravin *alias* Keshabhai Vagri (the appellant), residing at Behrampura, Ahmedabad. PI Mr. Pathan introduced himself to the appellant and conveyed the information which was received by him. After conveying the information, PI Mr. Pathan told the appellant that it was necessary to search bag carried by him and offered him to be searched in presence of a Gazetted Officer or a Magistrate, if so desired. However, the offer made by PI Mr. Pathan was declined by the appellant. Thereupon, the cotton-bag carried by the appellant was searched. The search resulted into find of a plastic-bag containing *charas*. The quantity seized was weighed and its weight

was found to be 2 Kilograms. Out of the quantity found from the possession of the appellant, a sample of 50 Gms was drawn whereas another sample of 50 Gms was also drawn and treated as "Reserve Sample." The samples drawn were sealed, as required by law. On demand by PI Mr. Pathan, the appellant could not produce any pass or permit authorising him to possess *charas*. Thereafter, PI Mr. Pathan completed second part of the *panchnama* at the spot and arrested the appellant. The appellant was served with seizure memo as well as grounds of detention. PI Mr. Pathan lodged his complaint with Mr. M. K. Katara, who was then PSO of Gandhinagar Zone Police Station and forwarded the report, as required by Section 57, to his immediate official superior. After registering the offence against the appellant, the complaint of PI Mr. Pathan was handed-over to Mr. P. M. Jadhav for necessary investigation. With forwarding-letter, *muddamal* seized was sent to Forensic Science Laboratory (FSL) for analysis through Head Constable Mr. M. M. Gosai. Mr. P. M. Jadhav recorded statements of those persons who were found to be conversant with the facts of the case. He obtained necessary report of analysis which indicated that the substance found from possession of the appellant and analysed was *charas*. On completion of investigation,

the appellant was charge-sheeted in the Court of learned Special Judge, Ahmedabad City, for commission of offence punishable under Section 22 of the Act. On the basis of charge-sheet, Sessions Case No. 268 of 1996 was registered.

3. The learned Additional Sessions Judge, Ahmedabad City, to whom the case was made over for trial framed necessary charge against the appellant at Exh. 1. It was read-over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined : (i) *panch-witness* Ratilal Lavjibhai Patel as PW 1, at Exh. 6; (ii) PI Mr. Nizirahmedkhan Nasibhai Pathan as PW 2, at Exh. 9; (iii) Mr. Navinpuri Naransinh Gosai as PW 3, at Exh. 24; (iv) PSO Mr. Maganbhai Kodarbhai Katara as PW 4, at Exh. 25; (v) Investigating Officer Mr. Prakashbhai Mahendrabhai Jadhav as PW5, at Exh. 28; (vi) Assistant Chemical Analyser Ms. Rajnikantaben Narendrakumar Shah as PW 6, at Exh. 29; and, (vii) Scientific Officer Mr. Maheshchandra Chimandas Champaneri as PW 7, at Exh. 31, to prove its case against the appellant. The prosecution also produced documentary evidence, such as, *panchnama* of search of bag carried by the appellant and seizure of *charas* therefrom, at Exh. 8;

report made by PI Mr. Pathan to his immediate official superior, as contemplated by Section 42 (2) of the Act, at Exh. 10; memorandum prepared by PI Mr. Pathan, indicating compliance of Section 50 of the Act, at Exh. 11; document indicating that grounds of arrest were communicated to the appellant, at Exh. 12; seizure memo served on the appellant, at Exh. 13; complaint lodged by PI Mr. N. N. Pathan at Exh. 14; forwarding letter by PI Mr. Pathan to Mr. M.K. Katara, who was then PSO of Gandhinagar Zone Police Station with which his complaint, *panchnama*, the appellant and *muddamal* were handed-over to him, at Exh. 15; report under Section 57 by PI Mr. Pathan to Deputy Superintendent of Police, at Exh. 16; forwarding letter with which *muddamal* was handed-over to FSL for analysis, at Exh. 17; and, extract of entry made in the register indicating that the information received by PI Mr. Pathan was reduced into writing, at Exh. 23; report of the analysis, at Exh. 30, etc. in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge of the Trial Court explained to the appellant circumstances appearing against him in the evidence of prosecution witnesses and recorded his

further statement, as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the appellant claimed that he was innocent. However, he did not adduce any evidence at all.

5. On appreciation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that on July 13, 1996, the appellant was found in possession of *charas* near *Chalte Pir Ni Darga*, Ahmedabad, at about 2.00 PM without pass or permit. The learned Judge further held that by possessing *charas*, the appellant had committed breach of provisions of Section 8 (c) of the Act, which is punishable under Section 22 of the Act. The learned Judge noticed that mandatory provisions of Sections 42 and 50 as well as Section 57 were complied with. In view of aboverereferredto conclusions, the learned Judge has convicted the appellant under Section 22 of the Act and imposed sentence referred to earlier by judgment dated August 29, 1997, giving rise to instant appeal.

6. Mr. D. M. Shah, learned Counsel of the appellant contended that it is not satisfactorily proved by the prosecution that the appellant was found in possession of

*charas* contrary to the provisions of Section 8 (c) of the Act and, therefore, unwarranted conviction of the appellant should be set aside. It was argued that mandatory provisions of Section 50 were never complied with before effecting search of the person of the appellant and, therefore, the impugned judgment should be set aside. It was claimed that neither the information received was reduced into writing by PI Mr. Pathan nor necessary report contemplated by Section 42 (2) of the Act was forwarded by him to his official superior and, therefore, the appellant should be acquitted. The learned Counsel contended that the record does not satisfactorily establish that the provisions of Section 57 were complied with and, therefore, the conviction of the appellant under Section 22 of the Act should be set aside. The learned Counsel emphasised that the evidence on record is not appreciated by the learned Judge of the Trial Court in its true perspective and, therefore, the appeal should be allowed.

Mr. N. D. Gohil, learned Counsel of the State Government, contended that the testimony of PI Mr. Pathan, which gets complete corroboration from testimony of *panch* Ratilal Lavjibhai Patel, examined at Exh. 6 as

well as testimony of Head Constable Navinpuri Naransinhpuri Gosai, which is recorded at Exh. 24, establishes beyond pale of doubt that the appellant was found in possession of 2 Kilograms of *charas* without pass or permit on July 13, 1996 near *Chalte Pir Ni Darga* and, therefore, it is wrong to contend that the appellant had not committed breach of provisions of Section 8 (c) of the Act. The learned Counsel of the State Government argued that the testimony of abovereferredto witnesses read with documentary evidence on record and more particularly, contents of Exh. 11 would indicate that provisions of Section 50 of the Act were scrupulously complied with and, therefore, the appellant is not entitled to any benefit on the ground that mandatory provisions of Section 50 were not complied with by PI Mr. Pathan before effecting search of the bag carried by the appellant. The learned Counsel emphasised that the evidence on record clinchingly establishes that not only the information received was reduced into writing, as required by Section 42 (1) of the Act, but necessary report was also forwarded by PI Mr. Pathan, as required by Section 42 (2) of the Act, to Deputy Superintendent of Police, who was his immediate official superior and, therefore, it is wrong to argue that mandatory provisions

of Section 42 were not complied with. The learned Counsel referred to document, which is at Exh. 16, and asserted that provisions of Section 57, which are directory in nature, are fully complied with. The learned Additional Public Prosecutor for the State argued that cogent and convincing reasons have been given by the learned Judge of the Trial Court for convicting the appellant under Section 22 of the Act, and as the learned Counsel of the appellant has failed to dislodge those weighty reasons, the appeal, which lacks merits, should be dismissed.

7. This Court has heard Mr. D. M. Shah, learned Counsel of the appellant and Mr. N. D. Gohil, learned Additional Public Prosecutor for the State at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

8. The plea that provisions of Section 50 of the Act were not complied with by PI Mr. Pathan and, therefore, the appellant should be acquitted, is devoid of merits.

It is relevant to notice that what was searched was cloth-bag carried by the appellant and not his person. In **State of H. P. Vs. Pawan Kumar, (2005) 4 SCC 350**, the Supreme Court has authoritatively ruled that a bag, a brief-case or any such article or container, etc. can, under no circumstances, be treated as body of a human being. According to the Supreme Court, they are given a separate name and are identifiable as such. The Supreme Court has explained that they cannot even remotely be treated to be part of the body of a human being, and depending upon the physical capacity of a person, he may carry any number of items like a bag, a brief-case, a suit-case, a tin-box, a *thaila*, a *gathri*, a holdall, a carton, etc. of varying size, dimension or weight. The Supreme Court has ruled that while carrying or moving along with them, some extra effort or energy would be required and they would have to be carried either by the hand or hung on the shoulder or back or placed on the head, which in common parlance, would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc., but it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act. In view of abovereferredto

principle of law laid down by the Supreme Court, this Court is of the firm opinion that provisions of Section 50 of the Act are not applicable to the facts of instant case. Therefore, no benefit can be granted to the appellant on the basis that provisions of Section 50 were not complied with by PI Mr. Pathan. Further PI Mr. Pathan is officer of Gazetted rank within the meaning of Section 41 (2) of the Act. In **M. Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449**, the Supreme Court has held that provisions of Section 42 (2) would not be applicable when search, seizure, etc. is conducted by a Gazetted Officer under Section 41 (2) of the Act. Therefore, the plea based on breach of Section 42 (2) of the Act cannot be entertained. In the alternative, this Court finds that reliable testimony of PI Mr. Pathan read with that of Mr. Gosai and *panch-witness* Ratilal makes it more than clear that provisions of Section 50 were complied with by PI Mr. Pathan before effecting search of cloth-bag carried by the appellant. The evidence on record satisfactorily establishes that PI Mr. Pathan had offered the appellant to search his cloth-bag in presence of a Gazetted Officer or a Magistrate, but the said offer was declined. The testimony of PI Mr. Pathan gets complete corroboration

from contemporary documents, namely, *panchnama* of search of bag and seizure of *charas* therefrom, produced at Exh. 8 as well as complaint, which is produced at Exh. 14 and contents of Exh. 11. Therefore, the plea, which is based on breach of provisions of Section 50, is found to be devoid of merits and is hereby rejected.

Similarly, the plea that provisions of Section 42 were not complied with and, therefore, the impugned judgment should be set aside, is devoid of merits. It is relevant to notice that seizure of *charas* was not effected from any building, conveyance or an enclosed place. Admittedly, *charas* was found near *Chalte Pir Ni Darga* which is a public place. Therefore, provisions of Section 42 would not be applicable to the case at all. This is so in view of the decisions of the Supreme Court in: (1) **Rajendra And Another Vs. State of M. P., (2004) 1 SCC 432**; (2) **Krishna Kanwar (Smt.) alias Thakuraeen Vs. State of Rajasthan, (2004) 2 SCC 608**; and, (3) **State of Haryana Vs. Jarnail Singh and Others, (2004) 5 SCC 188**. Even otherwise, the record satisfactorily establishes that provisions of Section 42 were scrupulously followed by PI Mr. Pathan. PI Mr. Pathan has given details as to how he had received the information and reduced the same

into writing. PI Mr. Pathan stands corroborated by contents of Exh. 23, which is an extract of entry from register maintained at the Police Station. The entry makes it very clear that the information received was reduced into writing by PI Mr. Pathan. Therefore, the provisions of Section 42 (1) of the Act were fully complied with. Further, the provisions of Section 42 (2) were also complied with by PI Mr. Pathan, which is quite evident from the contents of document produced at Exh. 10. It could not be pointed out by the learned Counsel of the appellant as to in which manner provisions of Section 42 were committed breach of by PI Mr. Pathan. As this Court finds that provisions of Section 42 are not applicable to the facts of instant case and in the alternative, that provisions of Section 42 were fully complied with by PI Mr. Pathan, the plea based on breach of Section 42, cannot be entertained and is hereby rejected.

The contention that provisions of Section 57 of the Act were not complied with is merely stated to be rejected. Though the Supreme Court has held in a catena of decisions that provisions of Section 57 of the Act are directory in nature, the evidence on record establishes

beyond reasonable doubt that the provisions of said Section were scrupulously complied with by PI Mr. Pathan. PI Mr. Pathan has stated in his substantive evidence before the Court that after the raid was over, he had made necessary report to his immediate official superior, as required by Section 57 of the Act on July 13, 1996 itself. He stands completely corroborated by contents of document produced at Exh. 16. Therefore, it is wrong to contend that provisions of Section 57 were not complied with by PI Mr. Pathan.

The record further shows that *charas* was found on search of bag carried by the appellant and this fact stands proved by reliable testimony of PI Mr. Pathan and also of other witnesses. No reason is pointed by the appellant as to why all witnesses have deposed against him. Therefore, false implication of the appellant stands ruled out. The finding that the appellant was found in possession of *charas* without pass or permit is eminently just and is hereby upheld. The record also shows that the samples drawn were properly seized and sealed and were kept in safe custody. It further establishes that the samples seized were sent to FSL which were found to be in intact condition. The report

of the analysis makes it more than clear that the substance analysed was *charas* within the meaning of the Act. No ground is made out by Mr. D. M. Shah, learned Counsel of the appellant, to interfere with the conviction of the appellant recorded under Section 22 of the Act. As the Court does not find any substance in the contentions raised by the learned Counsel of the appellant, the appeal, which has no merits, deserves dismissal.

9. For the foregoing reasons, the appeal fails and is dismissed. *Muddamal* be disposed of in terms of direction given by the learned Judge in the impugned judgment.

**[J. M. PANCHAL, J.]**

**[H. B. ANTANI, J.]**

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